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IN THE

Supreme Court of the United States

October Term, 1959

No. 122

HYMAN KARP and BENJAMIN T. MARCO,

Petitioners,

—against—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS.

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New York 4, New York

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February, 1960

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit (R. 104-118)* is reported at 266 F. 2d 435 (2d Cir., 1959). The opinion of the District Court, Southern District of New York, denying the pre-trial motion for a severance is reported at 158 F. Supp. 522 (S. D. N. Y., 1948).

Jurisdiction

The judgment of the Court of Appeals was entered on April 21, 1959 (R. 119). Petition for rehearing was denied

* References in parenthesis preceded by "R" are to pages of the printed record. References preceded by "Tr." are to pages of the typewritten minutes of the trial.

on May 14, 1959 (R. 119-120). The petition for a writ of certiorari was filed on June 11, 1959, and was granted on October 12, 1959 (R. 121), 361 U. S. 809 (1959). The jurisdiction of this Court rests on 28 U.S.C. §1254 (1).

Questions Presented

The questions presented are identical with those set forth in the Petitioners' Brief, in No. 111 (*Schaffer* v. *United States*) at page 2 thereof. That case will be argued together with the present case.

In addition, there is presented the following question:

> Whether the conduct of the prosecutor, during his closing argument to the jury, wherein he made representations of fact, and as of personal knowledge, not supported by the record, and wherein he tendered a false issue as to his own veracity and position, and made himself an unsworn witness for the prosecution, prevented a fair trial.

Statutes and Rules Involved

Reference is made to pages 2 to 5, inclusive, of the Petitioners' Brief in No. 111. The statutes and rules there listed are applicable to this case.

Statement

These petitioners adopt the Statement contained in the Schaffer brief, No. 111 (pp. 5-16, inclusive).

In addition, the following is added, in behalf of the petitioners Karp and Marco:

Petitioners Karp and Marco, while joining in all the points and contentions made by the Schaffers, urge one additional ground for the granting of the writ herein, to wit, deprivation of fair trial by reason of the prosecutor's arguments in summation. Accordingly, in addition to the facts set forth by the Schaffers, the following facts require mention here.

There was never any question but that all of the petitioners had openly purchased stolen goods from Anthony Stracuzza. They had paid for the goods by check, and received shipments via recognized agencies. The petitioners had maintained complete written records of the transactions, and these books were voluntarily turned over to the F.B.I. when they commenced their inquiry. The sole issue before the court was whether the petitioners had acted with knowledge of the stolen nature of the goods. The cornerstone of the prosecution was therefore the testimony of Anthony Stracuzza, a confessed thief, admitted loan shark, gambler and tax dodger; brother of Mario Stracuzza, another confessed and several-times-convicted thief; and husband of Dorothy Stracuzza, arrested and indicted in several cases, including the one at bar. It was Anthony Stracuzza who gave the important testimony bearing on this single, principal and crucial issue of the alleged guilty knowledge of the petitioners that the goods they were buying from Stracuzza were stolen.

The credibility of Anthony Stracuzza was accordingly subjected to heavy attack on cross-examination. Basic in this attack was the consistent contention of the defense, throughout the trial, that he was tailoring his testimony to favor the Government, in the expectation of a "reward"—lenient treatment not only for himself, but for his brother and his wife, as well.

Thus, Anthony had been charged not only in the two indictments tried in the instant case, but he had also been indicted jointly with a number of truck-drivers who were package thieves. In all of these cases he had pleaded guilty. In one additional case, resulting from a theft committed *after* he began to "cooperate" with the F. B. I., he had received a suspended sentence, with the help of the prosecutor. In the other case sentence had been repeatedly postponed, until after his testimony should have been given in the instant case. Mario, his brother, was in like state; he too had pleaded guilty to three indictments, and his sentence was repeatedly adjourned until after the present trial. Moreover, Mario had been caught by State authorities in a theft committed *after* he began his "cooperation", and, on his plea of guilty in the State Court, sentence had been repeatedly postponed, on representations by the Federal prosecutor that Mario was "cooperating" in the instant case, *and that his testimony was necessary in this case.* Finally, Anthony's wife, Dorothy, similarly indicted in the Federal Court in three cases, had been accorded a severance of trial, had never been placed on trial, had never pleaded guilty, and indeed, had never even been called as a witness in any trial.

Anthony and Mario had both testified at length for the Government in the prior trial of the thieves. Anthony, in the present trial, maintained that his wife had no guilty knowledge of his illegal activities (Tr. pp. 594, 599, 600-601), although he admitted testifying to precisely the opposite effect at the previous trial (Tr. pp. 594-595). In this connection he admitted that his wife maintained several bank accounts under different names, one of which was not her true one, into which accounts the proceeds of his sales to these defendants were deposited (Tr. pp. 491, 519, 649-

651); that some of the checks were cashed in supermarkets (Tr. p. 523); and that she had worked for several weeks in Stracuzza's office, up to the time of his arrest, making out bills, changing tickets on merchandise, and keeping records of the transactions (Tr. pp. 600-691). Indeed, the fictitious name of Stracuzza's business, "A. Schafler", was very much like her own maiden name which was "Schaefler" (Tr. pp. 595-598). In sum, she did everything, and knew everything which it was charged the defendants did and knew, to fasten guilty knowledge on them, and yet she was claimed by Stracuzza to be innocent of wrongdoing or wrongful knowledge or intent herself.

The defense stated in its opening that it would prove its contention that the Stracuzzas were testifying for an anticipated reward in the shape of hoped-for lenient treatment (Tr. p. 299): it made known its contention that the government was under a duty to call Mario and Dorothy as prosecution witnesses, so that they could be subjected to cross-examination by the defense, to which they were obviously hostile. Defense counsel vigorously protested the prosecutor's refusal to do so (Tr. pp. 1157-1160); it tried unsuccessfully to introduce in evidence the complete statements which were made by the Government to the sentencing judge at the time Stracuzza was given a suspended sentence on a previous case* (Tr. pp. 670-678); and at-

---

*The sentencing court asked the prosecutor whether this was an isolated offense, and the prosecutor replied in the affirmative. (Minutes of sentence, case C. 150-325, Sept. 19, 1956, before RYAN, J.):

"The Court: Are there any other larcenies that these men are connected with?

Mr. Kantor: No, your Honor.

The Court: This is an isolated larceny?

Mr. Kantor: As far as the Government knows."

The minutes of the present trial, as well as the minutes of the previous package thieves' trial, would furnish an interesting commentary on this appraisal of Stracuzza's activities.

tempted unsuccessfully—because the court kept it out—to show, by available court record evidence, that the large sums of cash seized from the possession of Mario and Dorothy Stracuzza, when they were arrested, were later returned to them with the consent of the United States Attorney after they had "cooperated" (Tr. pp. 874-875).

Finally, in summation, the defense argued that the Government's failure to call Mario and Dorothy to the stand, thus preventing their cross-examination, was relevant in considering whether or not Anthony Stracuzza was testifying in hopes of a reward for himself and the members of his family (Tr. pp. 1471-1477, 1484).

The relevant excerpts from the defense summation are set forth at pages 1 to 8, inclusive, of the Record.

In answer, the prosecutor made certain statements, to which objection was noted, a motion for mistrial made and denied, and exception taken (R. 8-10, 11a). The tenor of these remarks was a disingenuous and misleading statement to the jury that Dorothy Stracuzza was "still a defendant in this court. The charges are still open against her. They have not been dismissed in any way" (R. 9). Actually on July 31, 1958, shortly after the present trial was completed, the Government entered *nolle prosequis* in all the cases against Dorothy Stracuzza (R. 10-12).

The prosecutor went on to tell the jury that it was "the Government's representation to you that he (Mario Stracuzza, the brother, not called to the witness stand) could have offered nothing in the way of additional evidence that was not presented to you through his brother. . . . Furthermore, the Government is not required to call any wit-

ness if we believe that there is nothing further that that witness can contribute in the search for the truth." (R. 9).

The prosecutor concluded by telling the jury that "if you believe that the Government has in some way or other prevented you from getting the full truth of this entire case, that it in some way here concealed the true facts pertaining to any of these defendants, you have only one duty—you have to march into that jury room and acquit everyone of these defendants" (R. 10).

Summary of Argument

These petitioners respectfully refer to, and adopt, the Summary of Argument of the Schaffers, as set forth in their brief, at pages 16 to 22, inclusive.

In addition, the following is offered:

IV. Petitioners Karp and Marco submit that the manifest impropriety of the prosecutor's summation, which was promptly objected to, and made the subject of a motion for mistrial, deprived them of a fair trial.

The court gave no indication that the prosecutor's closing arguments were improper, and administered no rebuke, nor did it give ameliorating or corrective instructions. The affirmance in the court below of this ruling was in conflict with the rules laid down in this Court, the Circuit Courts and the State Courts. *Berger* v. *United States*, 295 U. S. 78, 88 (1935); *United States* v. *Spangelet*, 258 F. 2d 338 (2d Cir., 1958); *United States* v. *Tucker*, 267 F. 2d 212 (3d Cir., 1959); *Nalls* v. *United States*, 240 F. 2d 707 (5th Cir., 1957); *Snipes* v. *United States*, 230 F. 2d 165 (6th Cir., 1956);

Pierce v. *United States*, 86 F. 2d 949, 953 (6th Cir., 1936); *People* v. *Lovello*, 1 N. Y. 2d 436 (1956); *People* v. *Tassiello*, 300 N. Y. 425, 428-431 (1950); *People* v. *Black*, 317 Ill. 603, 148 N. E. 281 (1925); *People* v. *Hoffman*, 339 Ill. 57, 170 N. E. 680 (1948); *Balis* v. *State*, 137 Neb. 835, 291 N. W. 477 (1940); and see cases collected in 75 A. L. R. 48-59, 50 A. L. R. 2d 754-868.

To allow the opinion of the court below to stand, with its acceptance of the prosecutor's summation as a proper answer to the defense summation, would be to open the door to a new type of advocacy on the part of the Government, destructive of basic concepts of fairness.

Argument

We adopt, and make reference to, the Argument contained in the Schaffer brief, at pages 23 to 48, inclusive. We add the following point:

IV. The prosecutor's improper comments in summation deprived the petitioners of a fair trial.

A. Background of the questions presented.

The lengthy cross-examination of Anthony Stracuzza, bearing on his general untrustworthiness and criminal antecedents, designed to impair his credibility, was not undertaken captiously. On the contrary, it was clearly the duty of defense counsel to explore fully this aspect of the case. Stracuzza was the key witness who testified for the prosecution. It was Anthony Stracuzza who gave testimony that the defendant Karp called him from Fall River, and asked whether he had corrupt "police protection", when

Karp was supposedly fearful of exposure (Tr. pp. 430-432). Stracuzza also stated that he enclosed incriminating manufacturers' invoices in every shipment to Karp and Marco (Tr. pp. 403-406), as well as to the Schaffers (Tr. pp. 402-403); that the Schaffers repeatedly saw these incriminating invoices when they visited his premises (Tr. pp. 397-399); and he recounted alleged highly incriminating conversations with Marco (Tr. pp. 460-462). All of these matters bore on the single principal and crucial question of the alleged guilty knowledge with which the defendants acted; there was never any question but that they had purchased the goods, and the details of payment by check, and shipment by recognized agencies were openly carried out and reflected in complete records, which were voluntarily turned over to the F.B.I. when they disclosed to the defendants their interest in these matters.

Stracuzza's motives for lying, to favor the prosecution at the expense of the defendants, were real and compelling. He was obviously seeking favored treatment from the Government for himself, his wife and his brother. The glimpses of the pending "deal" which came through, despite restrictive rulings by the court, were disturbing: the return of money seized as evidence and the intercession of the Federal prosecutor in State prosecutions, for crimes committed by the Stracuzzas *after* they had been arrested in this case, were all of a piece. The sheltering of Mario—who had previously been described by the prosecutor as a necessary witness in this case—from being called and cross-examined, as well as the sheltering of the wife, seem clearly to have been the result of a policy decision to avoid further disclosures of the Government's plans to let the Stracuzzas all go free, if these defendants could be convicted with their

aid. The jury might well have been disturbed had they known what was even then quite evidently in contemplation, so far as the disposition of the cases aginst the Stracuzzas was concerned.

Accordingly, we submit, the line taken in the defense summation was a proper one, based on real considerations of evidence and lack of evidence in the case. It cannot be deemed, in any sense, improper advocacy setting up an unworthy standard, and justifying a low standard of advocacy on the part of the Government.

B. The prejudicial summation by the prosecutor.

1. The Assistant United States Attorney, toward the beginning of his closing statement, spoke as follows (R. 8-9):

> "Before I begin my summary, however, I wish to address myself, in the way of making a few comments as to some of the remarks that were made in the course of the summations by the defense counsel this morning.
>
> There were allusions from time to time, or suggestions, if you will, as to why the Government had not called certain persons as witnesses, so that they could be subjected to cross-examination by the defense counsel. Two of the names that were prominently mentioned were Mario Stracuzza and Dorothy Stracuzza.
>
> As you recall, during the course of the trial Dorothy Stracuzza, as was indicated, the Government's case aginst her pertaining to the two indictments that these defendants were brought to trial on, *she was severed; she is still a defendant in this court. The charges are still open against her. They have not been dismissed in any way.*" (Emphasis added).

We submit, parenthetically, that the foregoing is, at the very least, a holding out to the jury that Dorothy's case was still being held open with the expectation, in good faith, that she would be tried, or required to plead. In the context of answering the defense contention that Dorothy was being shielded by the Government, as a reward for her husband's testimony against the defendants on trial, no other meaning can reasonably be attributed to that statement. The good faith of that holding out can best be assessed in light of the fact that on July 31, 1958, shortly after the present trial and sentencing was completed, the Government entered *nolle prosequis* in all the cases against Dorothy Stracuzza (R. 10-12).

The stated grounds of the *nolle prosequi* were two in number:

(1) Dorothy had "denied that she had knowledge of the fact that the merchandise handled by her husband was stolen"; and

(2) Anthony had "stated that his wife Dorothy Stracuzza never knew the extent of his operations and that he never told her that he was dealing in stolen merchandise" (R. 12).

Yet the "denial" of Dorothy was never subjected to the proving or scrutiny of cross-examination because the Government never called her, and Anthony's statement that his wife knew nothing of his illegal operations was belied by his testimony at the trial, wherein he admitted on cross-examination that at a previous trial he had sworn that she had guilty knowledge (Tr. pp. 594-595).

2. The prosecutor continued his summing-up as follows:

> "As to the other defendant, Mario Stracuzza, *it is the Government's representation to you that he could have offered nothing in the way of additional evidence that was not presented to you through his brother.* Because if you will recall from the testimony of Agent Miller, both Stracuzzas were interviewed on each and every occasion by him, their story, their testimony, if you will, given to the FBI, was a joint story, and therefore, *the testimony of Mario Stracuzza, if he were called to testify, would be in a sense a repetition of all the details that you heard through the witness Anthony Stracuzza.*
>
> Furthermore, the Government is not required to call any witness *if we believe that there is nothing further that that witness can contribute in the search for the truth*" (R. 9; emphasis added).

Here the prosecutor was making a "representation" of fact, as of his own knowledge of the case, that Mario had nothing to contribute to the search for the truth, which would not be cumulative of Anthony's testimony. This was bolstered by the further statement that his "belief", based on his personal knowledge of what Mario could say, was that it would not "contribute" to the search for "the truth".

The record reveals, however, that when Mario's brother Anthony had been cross-examined, he had been constrained to admit theretofore undisclosed activities as a loan shark (Tr. pp. 493-496), had been forced to acknowledge that he was the possessor of two automobiles, and a cash-paid $13,000 house (Tr. pp. 483-485), that he was heavy and remarkably successful gambler (Tr. p. 497), that he was an admitted tax-dodger (Tr. pp. 497-499, 501)—and that

he had accumulated all his considerable possessions while working for a very small salary (Tr. p. 483). In addition, although Anthony claimed that everything he sold to the defendants was stolen, he admitted on cross-examination that he had very little personal knowledge of the details of this crucial element in the case, since it was his brother Mario, and not he, who had carried on the actual negotiations with the thieves, and it was Mario who had bought and paid for the stolen goods (Tr. pp. 388, 584-585, 586-587, 589). On the important issue of the defense claim of "reward" for Stracuzza's testimony, the defense was effectively blocked, by the Government's failure to call Mario, from showing (a) that Mario, when arrested, had had $900 in cash on his person, presumably for the purchase of stolen goods; that Dorothy, at the same time, had $1,900 in cash on her person; that all of this money had been seized by the F.B.I. as evidence; and that these sums were released to Mario and Dorothy, with the prosecutor's consent, shortly *after* they began to "cooperate" (Tr. pp. 874-875); (b) from showing that Mario had again been caught stealing *after* he began to "cooperate", and although indicted in the State Court, his sentence there was repeatedly adjourned, on the representation that he was "cooperating" with the Federal authorities, *and that he would testify in this case*, which of course, he never did because the Government did not call him (Tr. p. 1158). There can be little doubt that considerations of strategy to accomplish this blocking of cross-examination, rather than any reluctance to clutter the record with cumulative testimony, was the real reason for the failure to call Mario. Mario, we note, did testify at length in the previous trial, and was there subjected to searching and embarrassing cross-

examination (Tr. p. 1158). Apparently, neither he nor the Government was anxious that he be subjected to further cross-examination.

3. The prosecutor continued his summation as follows:

> "As Mr. Steinberg told you, and as I will say to you now, he had an opportunity to bring Mario Stracuzza to the witness stand. He also had an opportunity to bring Dorothy Stracuzza to the witness stand. He did not do so for reasons best known to himself.
>
> Now, in making these comments as to the conduct of the prosecution, there were [sic] some criticism as to the extent that the Government failed in its obligations to its citizens to bring out all the facts. I say to you as an assistant United States attorney, my job is not to convict people, but is to bring them here in court, give them a fair chance to meet the charges that the Government has presented against them.
>
> The motto on the building of the Department of Justice in Washington I think fairly indicates the attitude of the Government, as far as its citizens are concerned. It reads:
>
> 'The Government wins when justice is done its citizens in the court.'
>
> *Now, of course, if you believe that the Government has in some way or other prevented you from getting the full truth of this entire case, that it in some way here concealed the true facts pertaining to any of these defendants, you have only one duty—you have to march into that jury room and acquit everyone of these defendants*" (R. 10-11; emphasis added).

Motion was promptly made for the withdrawal of a juror, because of the impropriety of all of the foregoing remarks. The motion was denied, and an exception was taken (R. 10). The court administered no rebuke to the prosecutor, and gave no ameliorating instruction to the jury. It did not even indicate that there was any impropriety in any of the remarks to which objection was noted.

Here, we submit, the prosecutor was tendering to the jury the false issue of his own integrity, as a substitute for the real issue of the defendants' guilt. He was representing himself, not as a partisan advocate, but as a sort of objective judge, who would be only too happy to lose the case, if he had in any way erred. He was giving the jury the ineluctable choice of convicting the defendants, or in effect, convicting him of impropriety.

C. Consideration of the relevant cases.

The cases are unanimous in holding that where the prosecutor, in his summation, purports to tell the jury facts of his own knowledge, or his beliefs, or where he puts the propriety of his conduct in issue, he is committing reversible error, and a mistrial should be granted.

Berger v. *United States*, 295 U. S. 78, 84-89 (1935);

United States v. *Spangelet*, 258 F. 2d 338 (2d Cir., 1958);

United States v. *Tucker*, 267 F. 2d 212 (3d Cir., 1959);

Nalls v. *United States*, 240 F. 2d 707 (5th Cir., 1957);

Snipes v. *United States*, 230 F. 2d 165 (6th Cir., 1956);

Pierce v. *United States*, 86 F. 2d 949, 953 (6th Cir., 1936);
People v. *Jackson* (No. 201, decided Dec. 30, 1959, not yet officially reported), — N. Y. 2d —;
People v. *Lovello*, 1 N. Y. 2d 436 (1956);
People v. *Tassiello*, 300 N. Y. 425, 428-431 (1950);
People v. *Black*, 317 Ill. 603, 148 N. E. 281 (1925);
Balis v. *State*, 137 Neb. 835, 291 N. W. 477 (1940).

United States v. *Spangelet* is directly in point. In that case the Second Circuit—whence the case at bar stems—reversed a conviction in circumstances even less aggravated than in the present case. The defense summation offered the argument that a Government witness who was convicted as a co-conspirator with the defendant had had his bail reduced after he agreed to cooperate, and after he had pleaded guilty, and thus he had "Every motive for lying. . . ." In reply, the prosecutor, in his summation, remarked:

> "'What is your deduction? I assume the deduction was that I made a deal with Gandin's lawyers. I have been in this office for two and a half years and I am going to leave shortly. I have never made a deal with anybody'." (258 F. 2d at 342).

In reversing the conviction because of this erroneous and prejudicial remark, the court pointed out that a jury is apt to repose more confidence in a public prosecutor than in an ordinary lawyer, and it is especially wrong for a prosecutor to put his integrity in issue; the court wrote:

> ". . . the prosecutor represents a 'sovereignty whose obligation is to govern impartially.' *Berger*

v. *United States*, 295 U. S. 78, 88. As *Berger* suggests, this obligation may cause a jury to place more confidence in the word of a United States Attorney than in that of an ordinary member of the Bar. And it is especially inadmissible for the prosecutor to put into issue his own professional integrity, as was done here." (*Id.* at 342).

The court continued:

"We think the prosecutor's conduct here was equally improper; in effect, he gave testimony as to a fact allegedly within his personal knowledge without taking an oath or subjecting himself to cross-examination. *People* v. *Lovello*, 1 N. Y. 2d 436, 136 N. E. 2d 483 (1956)." (*Id.* at 343).

The court's opinion pointed out that the defense argument, to which the improper reply was made, was a proper one:

"Here, however, in order to destroy an inference based on testimony elicited from the government's witness, which the defense quite properly had presented to the jury, the prosecutor made a statement of fact wholly without substantiation in the record." (*Ibid.*).

Finally, the court noted, the attempted cure of the error by the trial judge was ineffectual:

"Finally, the instruction of the trial court as to this point, as quoted above, was obviously insufficient to cure the error. It left with the government the advantage improperly obtained. It even gave the jury the impression that the defendant's counsel rather than the prosecution was being admonished. And since the point involved affected Gandin's credibility

> upon which testimony the government's case depended, we cannot say that the error was harmless." (*Ibid.*).

Every word quoted from the *Spangelet* case is peculiarly apt to the instant case.

The Second Circuit's opinion in *Spangelet* relied on the New York Court of Appeals' decision in the *Lovello* case. There, the prosecutor's improper summation was almost exactly like the last portion of the remarks of the prosecutor in the case at bar:

> " 'Gentlemen, with all the sincerity at my command, I say to you that if that conversation did not take place, in your judgment, you stop right there. Don't waste another ten seconds on this case. Come back and say that this defendant is not guilty. If that conversation did not take place, then I am an aider and abettor to Omark's perjury'." (1 N. Y. 2d at 438-439).

The New York court in reversing, held:

> "We repeat the previous condemnations by ours and other courts of such practices by any prosecutor in making himself an unsworn witness and supporting his case by his own veracity and position (see *Berger* v. *United States*, 295 U. S. 78, 88; *People* v. *Tassiello*, 300 N. Y. 425, 430; *People* v. *Swanson*, 278 App. Div. 846, 847)." (*Id.* at 439).

The trial judge in the case at bar failed to reprimand the erring prosecutor, although "the situation was one which called for stern rebuke and repressive measures" (*Berger* v. *United States*, 295 U. S. 78, 85 [1935]). Further, the trial judge's total failure to correct the prejudicial re-

marks, compels the conclusion that the error is reversible. Thus, in the *Lovello* case the court held:

> "Defendant objected to the prosecutor's improper remarks, but the court indicated to the jury that there was no impropriety. Defendant took adequate exception. Without elaborating on the incident, we hold that it was reversible error." (1 N. Y. 2d at 439).

Another case directly in point is *United States* v. *Tucker*, 267 F. 2d 212 (3d Cir., 1959). There, the court reversed a conviction because of the prosecutor's summation. Just as in the case at bar, the prosecutor sought to make himself an unsworn witness for the prosecution, by explaining the absence of certain persons claimed by the defense to be culpable.

Most significantly, the court dealt with an attempted justification of the offending argument, on the claimed ground that it had been called forth by the defense argument. The court stated that failure to live up to the duty of the prosecution to speak fairly is not excused by the standard of advocacy set by the defense; there are other remedies for impropriety of that sort which may appear, and they are solely the court's perogative.

> "The government seeks to justify the prosecutor's statement to the jury by arguing that defense counsel had asked the jury to draw an unwarranted inference of blameless intent from the failure of the prosecution to prove that there were more extensive deficiencies in this vast project. But if this was an unreasonable inference it would have been proper and would have sufficed for the prosecutor to say so and to explain to the jury why in logic the record did not lend itself to that inference. He might have

> asked, in the light of the defense argument, that the court explain to the jury that the government could properly restrict its charge and proof to a few occasions involving wrongdoing, whether there were or were not any other similar events. *But he could not contradict the suggested inference by adding to the record his own unsworn presentation of additional facts. Even if the defense argument was improper, '[s]imilar latitude in respect to irrelevant matter permitted to counsel for the defendant neither vindicates nor palliates the license assumed by the prosecutors, nor lessens its destructive effect upon the fairness of the trial.'* See *Pierce* v. *United States*, 6 Cir., 1936, 86 F. 2d 949, 953." (Emphasis added; 267 F. 2d at 214.)

The foregoing, we submit, is ample rebuttal to the unfounded suggestion in the opinion below, that the defense summation constituted some sort of provocation, or justification, for the prosecution's remarks (R. 118, folio 1697).

In every case cited above, reversal followed where the trial court either omitted to correct the erroneous remarks of the prosecutor, or where it gave instructions designed to correct the remarks, but failing of their purpose. In the present case, no instruction at all was given. The curt denial of the motion for mistrial, indeed, could only have left the jury with the impression that the defense objection was ill-founded, and that the summation was a proper one. This, of course, was error which requires reversal.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

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February 1960.